



Employment law and Mobility of Workforce

Trade unions and collective redundancy: an English perspective

In common with most European countries, the UK has implemented the European Collective Redundancies Directive into domestic law. In the UK, this means that where a company is proposing to make large scale redundancies of 20 or more employees within a period of 90 days or less, it must consult on its proposals with appropriate representatives of the affected employees.

Companies are required to consult with appropriate representatives to explore ways of:

- Avoiding the dismissals
- Reducing the number of employees to be dismissed
- Mitigating the consequences of the dismissals; and (as necessary)
- Carrying out the redundancy process itself.

Companies are required to consult trade unions as “appropriate representatives” where the employees affected by the proposed redundancies fall into a category of which an independent trade union is recognised. It is important to note that the issue here is not whether the affected employees are trade union members, but whether the affected employees fall into a category of employee in respect of whom recognition has been granted.

In some circumstances, companies can choose to consult employees who have been directly elected by the affected employees. This can only happen where there is no recognised trade union in respect of those employees.

If a company breaches its obligation to consult a recognised trade union, then a claim can be brought by the union officer(s) who assumed the role of “appropriate representative(s)” on behalf of the affected employees. If the complaint is well founded, then the tribunal will make a declaration to that effect and **may** also make a “protective award”.

A “protective award” relates to an order against the company, requiring it to pay remuneration to the representatives for a “protected period”. The award may be extended to cover all the affected employees.

The protective award is designed to provide a sanction for any breach by a company of its obligations to consult. The sum to be awarded is worked out by reference to the employee’s gross pay per week, up to a period of 90 days. UK tribunals therefore begin by assuming that the maximum 90 day period should be taken unless good reason is shown to the contrary.

Practical tips on effective consultation with a trade union

If your company is placed in the position of having to make more than 20 people redundant, you should call a lawyer immediately. You will be about to embark on a complex process which involves far more than is set out in this article. However, for the purposes of this article, and on the assumption that you may have to consult a recognised trade union, you should prepare for the process by:

1. **Planning the whole process very carefully.** You will need to ask your lawyer to prepare the written communication to the trade union representatives, detailing the information required by law. You should also consult your lawyer on proposals for selection pools, selection criteria and redundancy terms. You should also prepare a timetable for consultation, to ensure that you retain control of the process throughout.
2. **Establishing the business case for redundancies.** This will help you to deal with any consultation on the subject of avoiding the redundancies. It will also help you when you give your reasons for the redundancies to the trade union representatives which you are required to do by law.
3. **Establishing numbers and timescales for the redundancies.** You should consult your lawyer at this point to determine the period of consultation required. This may be either 30 days or 90 days depending on the number of employees potentially affected.
4. **Establishing redundancy terms.**
5. **Identifying outplacement and other support.**

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Practical tips for progressing consultation with a trade union

A timetable and outline agenda should be discussed and agreed at the first consultation meeting. It may be appropriate to structure the consultation as follows, to ensure the process is focused and carried out expeditiously.

- The first consultation meeting should be used to communicate the proposals, seek agreement on the timetable for consultation and arrange the necessary meetings and try and agree the use of voluntary redundancies and/or redeployment.
- The purpose of the next meetings would be for the union to respond to the proposals and discuss whether redundancies can be avoided or reduced and the appropriateness of the proposed selection pools.
- Thereafter the process should be about implementation of the redundancy process, including selection criteria and how they will be applied; how individuals will be consulted and timescales. Alternative employment for those to be made redundant might equally be discussed at this stage.

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The role of trade unions in restructuring and collective redundancies procedures in Italy

In Italy the system of the so called “social shock absorbers” – the mechanisms provided to deal with collective redundancies caused by industrial restructuring – has developed considerably since the 1990s.

There has been a long reform process that has given rise to the introduction of new measures to deal with **redundancy situations**, the simplification of ways of access to the various legislative instruments, the progressive increase of productive areas and categories of employees covered by the protection system.

In this system trade unions and employee representatives play an important role in terms of information and consultation required by law.

In particular, labour surpluses that give rise to workforce reduction procedures are managed through two statutory mechanisms, depending on whether the reduction is temporary or permanent.

1 - The wages guaranteed fund

The Wages Guaranteed Fund intervenes in the event of a downturn or suspension of production due to temporary structural labour surpluses affecting a company because of “transitory events” or “temporary market situations”, when the employment relationships must be suspended for a limited period of time at the end of which they are expected to resume on a regular basis.

Workers involved are entitled to an “income support” (80% of the normal wage) paid out of a fund financed by the state and by firms and managed by the National Institute of Social Insurance (INPS).

The Wages Guaranteed Fund is divided into “ordinary” and “extraordinary” funds.

With reference to both measures, trade unions and employees representatives play a central role.

The “ordinary Wages Guarantee Fund” (CIG) intervenes (for a period of 3 months) in situations of temporary crisis caused by the economic climate. The employer can apply for intervention by the Fund to the provincial branch of National Institute of Social Security (INPS) following prior consultation with trade unions.

The “extraordinary Wages Guarantee Fund” (CIGS) is intended to handle “severe situations of labour surplus” and it intervenes (for a period of 12 months) in cases of restructuring, administrative reorganisation, severe structural difficulties or special procedures such as bankruptcy, liquidation or “extraordinary administration”.

The procedure to activate CIGS involves a preliminary phase of trade union consultation. In fact, the necessary condition for intervention by the CIGS is that the company must draw up a plan (with a maximum duration of 2 years) for the resumption of its activity and for the protection of workers.

For this purpose, the employer holds talks with the company-level unions (or in their absence, those most representative at local level) for joint examination of the company situation.

These talks are focused on: the plan which the company intends to implement in order to resume production; the number of workers to be laid off; the duration of their suspension; the criteria for identifying the workers to be suspended; and the ways for rotating workers still employed among the production units affected by lay-offs.

Finally, the company’s recovery plan is sent to the provincial Labour Offices to obtain authorisation from the Ministry of Labour.



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2 - Collective dismissal

When staff cuts are expected to be permanent due to production downsizing or discontinuation of the business, the rules on collective dismissal apply (providing that the company has 15 or more employees and the redundancies involve at least 5 employees in a period of 120 days).

The first step of a collective redundancy procedure is a communication made by the employer to the company trade union representatives or to the most representative national sectoral unions.

The unions may ask for contact with the employer in order to explore, on the one hand, possible alternatives to dismissals, on the other hand, the ways to mitigate the planned redundancies by providing assistance to the workers in the form of redeployment, training, outplacement, and especially the provision of “social plans”.

In order to prevent a decrease in employment levels, company-level collective bargaining may for example stipulate “job-security agreements”, a form of work-sharing which provide for reduced working hours with a corresponding reduction in pay.

Conclusions

The issue of collective redundancies in connection with social shock absorbers is an important topic in Italy for trade unions, employers’ organisations and in collective bargaining.

The main guidelines applied in the recent evolution of the whole system are generally taken to be the following: the first target is that of extending the range of application of the social shock absorbers to small and very small enterprises operating in non-industrial sectors; the second one is to improve a policy which is less “welfarist” and more oriented towards active employment policies (through measures such as vocational training schemes for dismissed employees, switching from companies in crisis to new employment opportunities etc.).

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Obligations to consult trade unions before redundancy/restructuring under French law

Under French law, an employer has to inform and consult the works council about any measures that may affect employment within the company. Such measures include collective redundancy and restructuring.

The works council is composed of both employee and union representatives. However, union representatives have no right to vote and may only participate in the discussions and give an advisory opinion.

When an employer plans a collective redundancy, the procedure for informing and consulting the works council varies according to the following criteria:

- The number of dismissals to be notified in the course of a 30-day period
- The number of employees working within the company or the establishment.

In the case of the collective redundancy of at least 10 people over 1 month in a company that employs over 50 employees, the employer has to set up a Social Plan containing concrete and precise measures in order to avoid as many dismissals as possible, such as job offers within other departments, establishments or subsidiaries, training offers etc.

After having informed and consulted the works council about the planned collective redundancy, the employer has to present the Social Plan to its members.

However, this procedure can be heavily complicated by any one of the following elements:

- The existence of a Central Works Council when the company owns several establishments employing over 50 workers in each
- The presence of a European Works Council when the company has a European dimension
- The appointment of a chartered accountant by the works council for the purpose of checking whether the collective redundancy is justified by the economic grounds put forth by the employer.

In 2002, a French statute authorised, on an experimental basis, the negotiation with the trade unions of a bargaining agreement called "Method Agreement" in order to facilitate the information and consultation process with the different works councils (Act no. 2002-73 of January 17, 2002).

In 3 years, 173 agreements were entered into, showing the success of that legal measure, which was then codified in the provisions of article L320-3 of the French Labour Code (Act no. 2005-32 of January 18, 2005).

The Method Agreement can be negotiated and applied at company, group or even industry level, even in the absence of any restructuring or collective redundancy.

The main purpose of this "Method Agreement" is to customise the different steps making up the procedure for informing and consulting the employee representatives, such as:

- The number of meetings of the different works councils
- The timetable of those meetings
- The terms of appointment of a chartered accountant by the works council
- The possibility of proposing alternative solutions to the planned restructuring or collective redundancy and the conditions which the employer must comply with when replying thereto.

Moreover, the "Method Agreement" can also provide for the social measures to be included in the Social Plan.

In order to be valid, this Method Agreement needs to be signed by at least one majority representative trade union, i.e. a trade union which won the majority of votes at the first round of the last works council elections. This majority is calculated by taking into account the number of valid votes for the list of each trade union in relation to the number of total valid votes.

The validity of the "Method Agreement" can be challenged within three months of the filing thereof (or twelve months if said Method Agreement provides for the social measures to be contained in the Social Plan as mentioned above).

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What is the role of trade unions in the Netherlands if the employer decides to do a reorganisation or a collective dismissal?

Dutch law concerning collective dismissals

The Dutch law applicable in cases of collective dismissals is the following: 'Wet melding collectief ontslag' (WMCO). The WMCO contains the rules which have to be met when an employer wants to dismiss more than twenty employees within a period of three months. The employer reports the dismissals in time to the interested parties of the employee, from which a trade union is one since they look after the interests of the employees. This reporting is to prevent or reduce the collective dismissals as well as to moderate the impact of the dismissals by taking social measures such as the redeployment or the retraining of the dismissed employees. If the employer does not report the dismissals to the trade union then he will not get the authorisation to terminate the employment.

Social plan

In cases of a (planned) collective dismissal a social plan is frequently drawn up. There is no legal definition of this 'social plan', but the following definition is generally accepted: a collective regulation which covers the consequences for employees at termination of employment, a merger, a takeover, a reorganisation or relocation of the venture. A social plan is generally determined in consultation between the trade unions and/or the employees council. The social plan is binding for the employer, but not for the employees. If the social plan has been approved by the trade unions, it has the status of a collective labour agreement (CAO). The question of the legal status of a CAO has been raised many times. When will the social plan, approved by trade unions, bind the employee in (collective) dismissal procedures? The committee of regional judges has explicitly pronounced, in their recommendations of 17 April 1998, to choose for a limited judicial review, but only if the social plan is agreed on by sufficiently represented trade unions. Since then, employers seem to have been using the social plan as a means to limit the costs of a staff reduction as much as possible. This then leads to the question whether it is desirable to diminish the discretionary powers of regional judges in dismissal procedures.

Case law

On 14 June 2002 the Supreme Court passed judgement on whether a judge can withdraw himself from the evaluation of a social plan, approved by trade unions, and whether the dismissal compensation in that plan is sufficient. The Supreme Court judged that if the social plan does not have the status of a collective labour agreement (CAO) and the fairness of the social plan is under dispute, the judge cannot withdraw himself from evaluating the fairness of the social plan. Following this judgement, one can say that in cases where the social plan does not have the status of a CAO and the fairness is under dispute, the judge cannot restrict himself to a limited judicial review, but has to review the social plan substantively in accordance with all the possible circumstances.

In a case from 7 April 1995 the Supreme Court ruled that an agreed dismissal compensation does not mean that, if the employee does not agree with the amount of the compensation, the judge cannot evaluate this plea of the employee. On the contrary, the judge can fully evaluate this plea taking into account all circumstances.

Conclusion

The role of trade unions depends on their say in the establishing of the social plan. The social plan contains important regulations such as dismissal compensation and as trade unions protect the rights of the employees it is therefore important that the trade unions have a say in establishing it. Case law shows that social plans are given great value, for example the limited judicial review by judges if the social plan is agreed on by trade unions, instead of the fact that the judge has been given discretionary powers by law. Also the fact that dismissal compensations which correspond with the regulations of the social plan are mostly seen as reasonable by judges shows the value which is given to a social plan. Besides that, the committee of regional judges has once more, in its recommendations, confirmed that the evaluation of a social plan which is agreed on by trade unions, has to be a limited legal review. The role of a trade union depends on the value which is given to the social plan and because of the increasing role given by judges to the social plan, the role of trade unions is also increasing.

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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of Employment law and Mobility of Workforce which are of general interest to all of our clients. It is jointly written and produced by PLG's Employment law and Mobility of Workforce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Employment law and Mobility of Workforce News. Further information is available on all topics but nothing in PLG Employment law and Mobility of Workforce News is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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